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5 IN THE UNITED STATES DISTRICT COURT  
6  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 EVA DENES,

No. C 07-4811 CW

10 Plaintiff,

ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
REMAND AND DENYING  
WITHOUT PREJUDICE  
DEFENDANTS' MOTION TO  
COMPEL ARBITRATION

11 v.

12 TRAVELERS INDEMNITY CO. and YVONNE  
13 GARRISON,

14 Defendants.  
15 \_\_\_\_\_ /  
16

17 Plaintiff Eva Denes moves to remand this action to state court  
18 on the basis that the Court lacks subject matter jurisdiction.  
19 Defendants Travelers Indemnity Co. and Yvonne Garrison oppose  
20 Plaintiff's motion and simultaneously move to compel arbitration  
21 and stay these proceedings. The matter was taken under submission  
22 on the papers. Having considered all of the papers submitted by  
23 the parties, the Court grants Plaintiff's motion and denies without  
24 prejudice Defendants' motion.

25 BACKGROUND

26 The following facts are alleged in the complaint. Plaintiff  
27 is a resident of California and a former employee of Defendant  
28 Travelers Indemnity Co., a Connecticut corporation. Defendant

1 Yvonne Garrison, a California resident, was formerly Plaintiff's  
2 supervisor at Travelers.

3 Plaintiff began working at Travelers in 1974. In 2003,  
4 Travelers merged with St. Paul Insurance Company. Travelers and  
5 its managers, including Garrison, subsequently began a campaign  
6 designed to force older employees out of their positions. To this  
7 end, Defendants subjected older employees to different performance  
8 standards than younger employees; assigned older employees extra  
9 work and unduly menial tasks; subjected older employees to  
10 unnecessarily critical evaluations; and encouraged supervisors to  
11 downgrade the performance reviews of the targeted employees.

12 Plaintiff, who was in her fifties during the relevant time  
13 period, was among the targeted workers. She was given extra case  
14 files, but was not given access to the materials she needed in  
15 order to perform her job. She was also subjected to constant  
16 demands that were intended to interfere with her ability to  
17 complete her work. As Plaintiff's manager, Garrison relentlessly  
18 criticized and harassed her, subjecting her to negative performance  
19 reviews that were a pretext for age discrimination.

20 On or about August 15, 2005, Garrison notified Plaintiff that  
21 her employment with Travelers was being terminated. In the section  
22 of the complaint entitled, "Facts Common to All Causes of Action,"  
23 Plaintiff alleges that, although at the time of her termination  
24 "she was eligible for at least fifty-two weeks of severance pay by  
25 virtue of her commendable and satisfactory thirty-one year tenure,"  
26 Travelers "gave her none." Compl. ¶ 20.

27 Plaintiff originally filed her complaint in California state  
28

1 court. The complaint asserts five causes of action, identified by  
2 their headings as: 1) age discrimination; 2) failure to prevent  
3 discrimination; 3) breach of employment contract; 4) breach of the  
4 implied covenant of good faith and fair dealing; and 5) violation  
5 of the California unfair competition law.

6 With respect to the first cause of action, the complaint  
7 alleges, "Defendants' actions described herein have violated  
8 California laws prohibiting age discrimination in the workplace,  
9 including Government Code §§ 12940(a) and 12941. These sections  
10 required Defendants, among other things, to refrain from  
11 discriminating against any employee over the age of 40; yet  
12 Defendants targeted older workers for harassment and termination."  
13 Id. ¶ 25. In setting out this cause of action, the complaint also  
14 alleges that Plaintiff's termination "was preceded by an  
15 unrelenting campaign of harassment and discrimination directed  
16 against her, accompanied by hints that she should retire." Id.  
17 ¶ 27.

18 With respect to the third cause of action, the complaint  
19 alleges the existence of an implied-in-fact employment contract  
20 between Plaintiff and Travelers, pursuant to which Plaintiff would  
21 be permitted to continue her employment "indefinitely as long as  
22 she carried out her duties in a proper and competent manner." Id.  
23 ¶ 40(A). The complaint alleges that the contract "was evidenced by  
24 various written documents," including "Travelers' written Benefits  
25 Manual." Id. ¶¶ 41, 41(A). The third cause of action does not,  
26 however, assert that Travelers breached the terms of the Benefits  
27 Manual.

1 Defendants removed this action to federal court, claiming  
2 that: 1) the complaint does not state a viable claim against  
3 Garrison, and therefore this Court has diversity jurisdiction over  
4 the matter; and 2) Plaintiff's claim for severance pay is preempted  
5 by the federal Employee Retirement Income Security Act (ERISA), and  
6 therefore this Court has federal question jurisdiction.

## LEGAL STANDARD

8        A defendant may remove a civil action filed in state court to  
9 federal district court so long as the district court could have  
10 exercised original jurisdiction over the matter. 28 U.S.C.  
11 § 1441(a). If at any time before final judgment it appears that  
12 the district court lacks subject matter jurisdiction over a case  
13 previously removed from state court, the case must be remanded. 28  
14 U.S.C. § 1447(c). On a motion to remand, the scope of the removal  
15 statute must be strictly construed. Gaus v. Miles, Inc., 980 F.2d  
16 564, 566 (9th Cir. 1992). "The 'strong presumption' against  
17 removal jurisdiction means that the defendant always has the burden  
18 of establishing that removal is proper." Id. Courts should  
19 resolve doubts as to removability in favor of remanding the case to  
20 state court. Id.

## DISCUSSION

## 22 || I. Diversity Jurisdiction

23 District courts have original jurisdiction over all civil  
24 actions "where the matter in controversy exceeds the sum or value  
25 of \$75,000, exclusive of interest and costs, and is between . . .  
26 citizens of different States." 28 U.S.C. § 1332(a). When federal  
27 subject matter jurisdiction is predicated on diversity of

1 citizenship, complete diversity must exist between the opposing  
2 parties. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365,  
3 373-74 (1978).

4 A defendant may remove a case lacking complete diversity and  
5 seek to persuade the district court that any non-diverse defendant  
6 was fraudulently joined. See McCabe v. Gen. Foods Corp., 811 F.2d  
7 1336, 1339 (9th Cir. 1987). "If the plaintiff fails to state a  
8 cause of action against a resident defendant, and the failure is  
9 obvious according to the settled rules of the state, the joinder of  
10 the resident defendant is fraudulent." McCabe, 811 F.2d at 1339.  
11 The defendant need not show that the joinder of the non-diverse  
12 party was for the purpose of preventing removal. Instead, the  
13 defendant must demonstrate that there is no possibility that the  
14 plaintiff will be able to establish a cause of action in state  
15 court against the alleged sham defendant. See id.; Ritchey v.  
16 Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).

17 Defendants argue that diversity jurisdiction exists here  
18 because the complaint does not state a claim against Garrison, the  
19 only Defendant who defeats complete diversity. Under the  
20 California Fair Employment and Housing Act, a supervisory employee  
21 may not be held personally liable for discriminatory employment  
22 decisions; only the employer may be held liable. Reno v. Baird, 18  
23 Cal. 4th 640, 645 (1998). However, individual employees may be  
24 held personally liable for harassment. Cal. Gov't Code  
25 § 12940(j)(3).

26 While discrimination and harassment have similar roots, the  
27 distinction between them is important. As the California Supreme  
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1 Court explained:

2 [T]he Legislature's differential treatment of  
3 harassment and discrimination is based on the fundamental  
4 distinction between harassment as a type of conduct not  
5 necessary to a supervisor's job performance, and business  
6 or personnel management decisions -- which might later be  
7 considered discriminatory -- as inherently necessary to  
8 performance of a supervisor's job. . . . [H]arassment  
9 consists of conduct outside the scope of necessary job  
10 performance, conduct presumably engaged in for personal  
11 gratification, because of meanness or bigotry, or for  
12 other personal motives. Harassment is not conduct of a  
13 type necessary for management of the employer's business  
14 or performance of the supervisory employee's job.

15 Discrimination claims, by contrast, arise out of the  
16 performance of necessary personnel management duties.  
17 While harassment is not a type of conduct necessary to  
18 personnel management, making decisions is a type of  
19 conduct essential to personnel management. While it is  
20 possible to avoid making personnel decisions on a  
21 prohibited discriminatory basis, it is not possible  
22 either to avoid making personnel decisions or to prevent  
23 the claim that those decisions were discriminatory.

24 Reno, 18 Cal. 4th at 645-46 (quoting Janken v. GM Hughes  
25 Electronics, 46 Cal. App. 4th 55, 62-64 (1996)) (citations  
omitted).

26 Defendants argue that, although the complaint asserts a claim  
27 for employment discrimination, it does not purport to state a claim  
28 for harassment. The complaint is admittedly ambiguous as to  
whether Plaintiff intends to pursue a claim of harassment, which is  
made actionable by § 12940(j) of the California Government Code.  
"Harassment" is not denominated as a separate cause of action in  
the complaint, and Plaintiff purports to bring her age  
discrimination claim under § 12940(a) of the Government Code, which  
prohibits discrimination in employment decisions. Nonetheless, the  
complaint is littered with variants of the word "harass," including  
in the description of the cause of action for age discrimination.

1       It is most likely that Plaintiff's failure specifically to  
2 allege a violation of § 12940(j) as a separate cause of action is  
3 simply an oversight. "It is an elementary principle of modern  
4 pleading that the nature and character of a pleading is to be  
5 determined from its allegations, regardless of what it may be  
6 called, and that the subject matter of an action and issues  
7 involved are determined from the facts alleged rather than from the  
8 title of the pleadings." Lovejoy v. AT&T Corp., 92 Cal. App. 4th  
9 85, 98 (2001) (concluding that the complaint stated a cause of  
10 action for fraudulent concealment despite its label as fraud based  
11 on affirmative misrepresentation). Thus, there is no basis for the  
12 Court to disregard Plaintiff's assertion that she intends to pursue  
13 a harassment claim against Garrison, regardless of the labels in  
14 the complaint.

15       Defendants also argue that, even if the complaint were  
16 interpreted as asserting a harassment claim, the factual  
17 allegations in the complaint are nonetheless insufficient to state  
18 such a claim. To determine its jurisdiction, the Court need not  
19 decide whether Plaintiff can prove a legally cognizable claim of  
20 harassment against Garrison, but need only conclude that she has  
21 pleaded one under state law. Briqgs v. Lawrence, 230 Cal. App. 3d  
22 605, 610 (1991). It is Defendants' burden to demonstrate that  
23 there is no possibility that Plaintiff will be able to establish a  
24 cause of action against Garrison in state court. On a demurrer, a  
25 California court will liberally construe all of the complaint's  
26 properly pleaded material allegations as true, and will "give the  
27 complaint a reasonable interpretation by reading it as a whole and  
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1 all its parts in their context" to "ensure the pleading . . .  
2 apprises the adversary of the factual basis for the claim." People  
3 ex rel. Lungren v. Superior Court, 14 Cal. 4th 294, 300 (1996); Lim  
4 v. The TV Corp. Int'l, 99 Cal. App. 4th 684, 690 (2002); see also  
5 Cal. Civ. Proc. Code § 452. Moreover, "[i]n testing the legal  
6 sufficiency of a pleading against a general demurrer, all properly  
7 pleaded allegations, including those that arise by reasonable  
8 inference, are deemed admitted regardless of the possible  
9 difficulty of proof at trial." Saxer v. Philip Morris, Inc., 54  
10 Cal. App. 3d 7, 18 (1975).

11 The complaint is rife with allegations that Garrison  
12 "harassed" Plaintiff. It is true that "[a]n allegation that an act  
13 is wrongful and unlawful is a mere conclusion," and "conclusions of  
14 law are not admitted by demurrer." Metzenbaum v. Metzenbaum, 86  
15 Cal. App. 2d 750, 754 (1948); see also Vilardo v. Sacramento  
16 County, 54 Cal. App. 2d 413, 418-419 (1942). However, although the  
17 complaint contains few details of the nature of Garrison's alleged  
18 harassment, it nonetheless clearly alleges that Garrison and other  
19 supervisors went out of their way to make working conditions  
20 unpleasant for Travelers' older employees. The multiple references  
21 to continual harassment and criticism imply that Garrison was  
22 hostile to Plaintiff in a way that went beyond simply making  
23 adverse employment decisions on the basis of Plaintiff's age.  
24 Excessive or inappropriate criticism is not a "business or  
25 personnel management decision," Reno, 18 Cal. 4th at 645, nor is it  
26 "conduct of a type necessary for . . . performance of the  
27 supervisory employee's job," id. at 646, and therefore may rise to  
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1 a level that constitutes harassment.

2 With all reasonable inferences drawn in favor of Plaintiff,  
3 she has alleged conduct of the type actionable as harassment.  
4 Though the complaint is short on details, Defendants have cited no  
5 California case dismissing a claim of harassment for failure to set  
6 forth in exhaustive detail the specific comments and actions upon  
7 which the claim is based.<sup>1</sup> Thus, while it remains to be seen  
8 whether Plaintiff will be able to produce evidence sufficient to  
9 prove such a claim, the Court cannot conclude that there is no  
10 possibility that she will be able to establish a cause of action  
11 for harassment against Garrison. Accordingly, Defendants have not  
12 met their heavy burden of establishing that this Court has removal  
13 jurisdiction.<sup>2</sup>

14 II. Federal Question Jurisdiction

15 Defendants contend that the Court has federal question  
16 jurisdiction over this action under 28 U.S.C. § 1331 because  
17 Plaintiff's claims are preempted by ERISA. Under ERISA, state law  
18 claims are preempted if they "relate to" an ERISA plan and fall  
19 within the scope of ERISA's civil enforcement mechanism. Toumajian

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21 <sup>1</sup>In any event, the complaint's shortcomings are of the type  
22 that is readily curable by amendment. Garrison is directly linked  
23 to the events leading to Plaintiff's termination. Even if the  
24 Court were to find that the complaint did not allege sufficient  
25 facts to state a claim against Garrison, it would dismiss the  
harassment claim with leave to amend. See Cook, Perkiss & Liehe,  
Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th  
Cir. 1990). Following amendment, Plaintiff would be permitted  
again to move for remand.

26 <sup>2</sup>Plaintiff asserts that the complaint states several other  
27 claims against Garrison. Because the Court finds that Plaintiff  
has stated a harassment claim, it need not determine whether the  
complaint states other claims as well.

1 v. Frailey, 135 F.3d 648, 654 (9th Cir. 1998). A "core factor" in  
2 determining whether a claim "relates to" an ERISA plan is whether  
3 "the claim bears on an ERISA-regulated relationship." Rutledge v.  
4 Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212. 1219 (9th  
5 Cir. 2000).

6 Defendants' preemption argument is based primarily on their  
7 interpretation of the complaint as asserting a claim for the fifty-  
8 two weeks of severance pay for which Plaintiff claims she was  
9 eligible. The parties appear to agree that such a claim would be  
10 governed by Travelers' employee benefit plan, and thus would be  
11 preempted by ERISA. However, Plaintiff denies that she is  
12 asserting a claim for severance pay.

13 As with Plaintiff's harassment claim, the complaint does not  
14 clearly specify whether Plaintiff asserts a claim based on  
15 Travelers' failure to pay severance benefits to her. The  
16 allegation concerning severance pay is contained in the section  
17 entitled, "Facts Common to All Causes of Action," and Travelers'  
18 failure to provide Plaintiff with severance pay is not specifically  
19 mentioned in the section of the complaint listing the causes of  
20 action. While the complaint could be interpreted as asserting a  
21 claim for severance pay, the Court sees no reason to disregard  
22 Plaintiff's representation that she in fact does not assert such a  
23 claim.<sup>3</sup> It would not be appropriate for the Court to assert

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25 <sup>3</sup>The Court notes that, as with Plaintiff's harassment claim,  
any ambiguity in the complaint could be resolved by amending it.  
26 It would defeat the goal of judicial economy to require Plaintiff  
to amend the complaint to eliminate the reference to severance pay,  
27 only ultimately to grant a renewed motion for remand.

1 subject matter jurisdiction over this action based on a claim that  
2 Plaintiff does not intend to pursue.<sup>4</sup>

3 Nor do the complaint's other references to employee benefits  
4 render this an action subject to ERISA preemption. Contrary to  
5 Defendants' suggestion, Plaintiff does not claim that Travelers  
6 breached the written "Benefits Manual" -- the complaint refers to  
7 the manual only as evidence that there was an implied-in-fact  
8 employment contact between Plaintiff and Travelers. See Compl.  
9 ¶ 41(A). Travelers is alleged to have breached this employment  
10 contract, not by failing to give Plaintiff the benefits she was  
11 due, but by terminating Plaintiff without cause because of her age.  
12 This type of claim does not relate to ERISA, and is not preempted.  
13 See Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987)  
14 (plaintiff's breach of contract claim for discharge without good  
15 cause was not preempted, because it relied on a legal theory that  
16 was independent of the employer's benefit plan). Additionally, the  
17 allegation that Plaintiff suffered the loss of employee benefits as  
18 a result of this breach, Compl. ¶ 45, does not convert the claim  
19 into an ERISA claim; "a claim does not 'relate to' an ERISA  
20 employee benefit plan simply because a court would refer to the  
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22 <sup>4</sup>Defendants need not be concerned that Plaintiff may attempt  
23 to assert a claim for severance pay following remand of this  
24 action. Such a claim would be preempted by ERISA, and in any  
25 event, Plaintiff would likely be judicially estopped from asserting  
26 the claim. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001)  
27 ("Where a party assumes a certain position in a legal proceeding,  
and succeeds in maintaining that position, he may not thereafter,  
simply because his interests have changed, assume a contrary  
position, especially if it be to the prejudice of the party who has  
acquiesced in the position formerly taken by him.") (quoting Davis  
v. Wakelee, 156 U.S. 680, 689 (1895)).

1 plan in calculating damages." Funkhouser v. Wells Fargo Bank,  
2 N.A., 289 F.3d 1137, 1143 (9th Cir. 2002).

3 Regardless of how they are framed, Plaintiff's claims are for  
4 harassment and employment discrimination on the basis of her age.  
5 Resolving these claims will not require reference to ERISA or  
6 interpretation of the Travelers employee Benefit Manual, nor could  
7 Plaintiff pursue these claims under ERISA's civil enforcement  
8 mechanism. Accordingly, they are not preempted by ERISA, and the  
9 Court does not have federal question jurisdiction over this action.

10 CONCLUSION

11 For the foregoing reasons, Plaintiff's motion to remand this  
12 action to state court is GRANTED. Because the Court lacks subject  
13 matter jurisdiction over this case, it is without power to  
14 adjudicate Defendants' motion to compel arbitration. Therefore,  
15 that motion is DENIED WITHOUT PREJUDICE to Defendants' re-filing it  
16 in the state court proceedings. The clerk shall close the file.  
17 Each party shall bear its own costs.

18 IT IS SO ORDERED.

19  
20 Dated: 2/15/08



21 CLAUDIA WILKEN  
22 United States District Judge  
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